SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 57

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKRIDGE, GEORGE S. TROW AND WILLIAM L. O'DONOVAN,
Petitioners,

vs.

WHITE PLAINS PUBLISHING COMPANY, INC.,
Respondent

BRIEF FOR RESPONDENT, WHITE PLAINS PUBLISHING COMPANY, INC.

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Opinions Below

The opinion of the Trial Term, Supreme Court, Westchester County, is reported at 180 Misc. 8, 41 N. Y. S. 2d 534 (R. 533-541, A. R. 88-95).[1]

The opinion of the Appellate Division of the Supreme Court for the Second Judicial Department is reported at 267 A. D. 284, 45 N. Y. S. 2d 479 (R. 551-561, A. R. 97-103).

The decision of the Court of Appeals of New York affirming the Appellate Division's reversal of the Trial Term is reported at 293 N. Y. 781.

[1] In this brief, respondent's record references refer to the original record presented to this Court. Where the matter referred to is also printed in the abbreviated record, this record reference will be indicated by the letters A. R.

The order of the Court of Appeals amending the remittitur is reported at 294 N. Y. 701 (R. 547, A. R. 105).

Jurisdiction

The judgment of the Court of Appeals of New York was entered on November 16, 1944. The remittitur of the Court of Appeals was amended on March 9, 1945. Between the entry of the judgment and the amendment of the remittitur petitioners obtained an order from Associate Justice Jackson of this Court extending their time to apply for a writ of certiorari sixty days from February 12, 1945.

Petitioners filed their petition for a writ of certiorari on April 12, 1945, invoking the jurisdiction of this Court under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13, 1925. Certiorari was granted on May 21, 1945.

Questions Presented

1. Whether respondent was engaged in commerce or the production of goods for commerce and whether petitioners were engaged in any process or occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938.

2. Whether Congress, in the light of the prohibition in the First Amendment against the abridgment of the freedom of the press by any form of restraint whatsoever, has the power to apply the Act to the newspaper publishing business of respondent.

3. Whether, in view of the provisions of the First and Fifth Amendments, Congress has the power to regulate the business of the press by classifying the press on the basis of volume of circulation, frequency of issue and area of distribution in such a manner as to exempt more than 72 per cent of the total number of newspapers from the burdens

of the Act, while subjecting all others engaged in the same business to those burdens.

4. Whether petitioners sustained the burden of establishing the fact of overtime work and also the quantity of overtime work each week in the light of the record evidence that their claims bore every earmark of an afterthought manufactured for the occasion to which no credence should be given.

5. Whether petitioners' method of computation conforms to the provisions of Section 7 of the Act as interpreted by this Court.

6. Whether petitioners or any of them were professional employees and therefore exempt from the provisions of the Act.

Constitutional, Statutory and Regulatory Provisions Involved

The constitutional provisions involved are Article I, Section 8, Clause 3 of the Constitution of the United States and the First and Fifth Amendments to the Constitution of the United States. These provisions are set forth in the Appendix, page 47.

The statutory provisions involved are those embraced in the Fair Labor Standard Act of 1938 (52 Stat. 1060, 29 U. S. C. Sec. 201 *et seq.*).

The regulatory provisions involved are the regulations of the Administrator of the Wage and Hour Act, promulgated under the authority granted in Section 13 (a) (1) of the Act. These regulations are set forth in the Appendix, pages 49-50.

Statement of the Case

Petitioners started suit on September 14, 1942, in the Supreme Court of the State of New York, Westchester

County, to recover overtime compensation claimed to be due under the provisions of the Fair Labor Standards Act. Respondent for many years prior to February 28, 1941, had been publisher of an evening newspaper, known as The White Plains Daily Reporter, published each weekday evening, except Sunday and certain specified holidays, throughout the year. The newspaper suspended publication on February 28, 1941.

Following the filing of the complaint in the Trial Court respondent moved to dismiss under Rule 106 of the Rules of Civil Practice of New York on the ground that the complaint did not state facts sufficient to constitute a cause of action and also for an order dismissing the complaint under Rule 107 on the ground that the court had no jurisdiction over the subject matter of the action for the reason that (a) the Act under which the claims were alleged to have arisen is not a statute which can be applied to the business of respondent by reason of the provisions of Article I, Section 8, Clause 3 (the commerce clause) and the First Amendment to the Constitution of the United States, and (b) the Act violates the rights of respondent as guaranteed by the Fifth Amendment to the Constitution of the United States. The motion was denied.

Subsequently all of the petitioners filed an amended complaint, answer to which was filed by respondent. When petitioners rested during trial, respondent moved to dismiss for failure of proof which motion was denied. Petitioners moved to have the pleadings conformed to the proof and over objection this motion was granted. Respondent then renewed its motions on the statutory and constitutional grounds which were denied, and petitioners moved for judgment on the pleadings.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation

in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest,* plus an additional equal amount as liquidated damages, and (b) attorney's fees and costs. The total sum of the judgment for all petitioners was $42,110.34.[2]

Facts Established by the Record

Nature of Petitioners' Work and Basis of Their Claims for Overtime

Nature of Employment. Petitioners were paid weekly salaries, not hourly rates. The salaries of each varied during the period in controversy. None kept any regular account of his time when employed by respondent or was required to do so by respondent. Petitioners reported for work at various times during the day depending upon the nature of the work performed by each. They punched no time clock when they came in; they punched no time clock when the day was over; and they never reported any overtime to their employer or made any claim for overtime during the course of their employment or prior to the filing of the suit herein, more than eighteen months after the last of them was discharged and after respondent ceased publishing its newspaper.

It is undisputed that the work of each petitioner varied in character from day to day, from week to week; that they were never instructed how to do it or when to do it; that the coverage of assignments was left to the discretion of

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[2] The judgment when reduced to dollars and cents cost imposed a burden of $1.12½ on each copy of respondent's newspaper sent outside of the State of New York during the period in controversy whereas the price actually paid by subscribers for those newspapers was 2¢ per copy.

the men receiving them. Just as the work varied in character, so did the time consumed fluctuate from day to day and week to week.

How Petitioners Calculated Their Claimed Overtime

Each of the petitioners who appeared to prosecute his claim offered certain tabulations as to overtime alleged by him to have been worked while in the employ of respondent. All of these tabulations were prepared after the institution of the suit and each of them in respect of the particular petitioner in behalf of whom it was offered differed from the claim advanced in the amended complaint. The method of preparation of these tabulations was disclosed during the course of the testimony. Petitioner Mabee who was the first witness testified that he had spent some 50 hours in the White Plains Public Library going over the files of the White Plains Reporter from October 24, 1938, until February 28, 1941, when it suspended publication (R. 54). From those files he made notes of the work which he did, estimated the hours which he spent on each of the assignments and then computed his claim of overtime. Mabee admitted on cross-examination that he kept no records and that he did not refer to the assignment book to check on his calculations. The concluding question and Mabee's answer thereto illustrate how his work was done, as follows:

> "Q. Where were any records kept such as you attempted to make here of the work of yourself and of the other employees?
>
> "A. Only in my head" (R. 106).

Even so, Mabee asserted that he could identify each and every job he had performed during the period in controversy by reference to the printed volumes of the White Plains Reporter (R. 80) and also that because of his famil-

iarity with the assignments of the other petitioners herein he could identify their work.

Cross-examination of other petitioners developed that Mabee had also prepared tabulations of their claimed overtime for them which they in turn checked mainly from memory. Petitioner Barnum, for instance, testified that he took Mabee's word as to many of the assignments which he claimed to have covered and for which he claimed overtime compensation (R. 196) and that he didn't even bother to check Mabee's calculations against the printed volumes of the White Plains Reporter kept in the Public Library. He merely checked many of Mabee's listings from his head (R. 198).

Barnum offered a tabulation of his overtime hours, which was admitted in evidence. Later, after it developed he was on vacation at a time the tabulation showed six overtime assignments, he took the stand and corrected it by deleting those six assignments and substituting four additional ones after he returned (Plaintiffs' Ex. 7 and 14).

Petitioner Mockridge kept clippings of byline stories which he wrote (R. 111), but depended upon Mabee to prepare a list of his other work (R. 139). Mockridge himself originally claimed to have covered a G. O. P. rally in White Plains but when Mabee informed him that some one else had written that story he struck it from his tabulation (R. 139). No one of the petitioners even attempted to claim that his tabulation was accurate in any sense of the word. Each asserted that it was a minimum calculation, not a maximum and not an accurate calculation.

On Mabee's tabulation of overtime claims were two claims for time spent while he was playing golf with the editor of the newspaper (R. 88-89). Three of the original petitioners worked on the sports desk and the testimony developed the fact that all three of them would go to such

events as boxing matches, wrestling matches and hockey games where one would write the story, yet all claimed overtime. Petitioner O'Donovan was active in civic and in National Guard work (but resigned his commission just before the Guard was called into active service), yet he claimed overtime when he went to military functions, when he presided as toastmaster at various dinners and banquets in connection with his civic and military activities (R. 305-306) and asserted that he would not have participated in any such activities except for his connection with the respondent's newspaper (R. 302). O'Donovan was responsible for his own assignments, if such they can be called, and respondent never heard anything about many of them until he presented his claim for overtime at the trial.

Five of the six petitioners calculated their overtime on an even hour basis. The sixth calculated his on a half hour basis. The record demonstrates that newspaper reporting cannot be calculated on either basis.

As the record stands today no one, not even the petitioners themselves, can tell how much overtime, if any, they worked.

The same is true as to money damages claimed. The amounts testified to by the different petitioners differed from the amounts claimed by them in their complaint. None of these amounts is based on the payroll week itself.

There was no evidence before the trial court in the nature of a payroll week tabulation which applies a true hourly rate against the actual number of hours worked in any such week even though the trial judge specifically requested counsel for petitioners to prepare and present such tabulations. All that counsel did was this: He fixed the hourly rate by dividing the weekly wage by 40 and he fixed the overtime rate at one and one-half times that result. Then he took each of the petitioners' claims of "minimum over-

time" and multiplied it by the overtime rate which he in turn had fixed by the above described method.[3]

AS TO THE NATURE OF PETITIONERS' WORK

O'Donovan. The petitioner O'Donovan was City Editor of the White Plains Reporter (R. 287). As such he had charge under the direction of the Editor of getting out the news pages of that newspaper each day (R. 315). In addition, during a long period when the Editor was away on account of illness, he was in complete charge of all of the editorial content of the newspaper including the editorial pages as well as the news pages (R. 314). He made recommendations on hiring and firing (R. 313-314) and on the increasing or decreasing of salaries. He carried out the policies of his employers and owned a small amount of stock in respondent company (R. 306).

Mabee. The petitioner Mabee during the greater portion of his time in controversy with respondent was the Assistant City Editor of the newspaper. As such he gave assignments to reporters, handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 44-46, 67-68). He directed the work of others at all times even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments.

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[3] This Court, in a case wherein it held the law to apply, held that the "regular rate" at which one is employed, made by Section 7 of the Federal Fair Labor Standards Act of 1938 the basis upon which his overtime is to be computed is, in the case of one working for a varying number of hours per week for a fixed weekly wage, the quotient obtained by dividing the weekly wage by the number of hours worked each week even though such quotient may vary from week to week with the number of hours worked. Wages divided by hours equal regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours. *Overnight Motor Transportation Company, Inc.* v. *William H. Missel,* 316 U. S. 572, 580 (1942).

Petitioners Barnum, Tompkins, Mockridge and Trow. Petitioners Barnum, Tompkins, Mockridge and Trow were reporters. All of them were engaged solely in local activities, that is, in gathering news of various events that occurred in and about White Plains and adjacent Westchester County, writing such news and turning it in for publication to the newspaper.

As to Respondent's Business

Respondent was engaged in the publication of a local newspaper at White Plains, Westchester County, New York. It had no interest in out of state circulation. Indeed it did not even seek to circulate throughout the whole of Westchester County. Throughout the period in controversy its total circulation ranged from 9,000 to 11,000 copies daily and never more than 45 copies a day were sent outside the State of New York—those few copies going to residents of White Plains temporarily away from home.

The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press and also of International News Service, national news gathering organizations. The Associated Press Service was not received directly from the Associated Press office in New York but was relayed to respondent over a County News Service wire not owned or controlled by the Associated Press.

Under its contract with the International News Service, respondent was obligated to make available to International News Service at respondent's offices in White Plains its local news for such use as International News Service wanted to make of it.

It is undisputed that very little either of Associated Press or International News Service reports was used by respondent in the publication of its newspaper (R. 74, A. R. 38). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48, A. R. 30). It also obtained certain news features from sources outside of the State of New York (R. 49, A. R. 31).

The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72, A. R. 37).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73, A. R. 37). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of

advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. After they reached respondent's office they were processed by independent acts of a purely local nature.

Appellate Division's Reversal

Respondent appealed from the judgment of the Trial Court to the Appellate Division, Second Department of the Supreme Court of the State of New York which unanimously reversed the Trial Court. In its appeal respondent presented all of the issues hereinbefore referred to but the Appellate Division in its opinion stated:

> "In view of our determination that appellant (respondent here) was not engaged in interstate commerce and that respondents (petitioners here) were not engaged in any process or occupation necessary to the production of goods in interstate commerce within the meaning of the Act, it is unnecessary to discuss the other questions raised."

Petitioners appealed from the order of the Appellate Division to the Court of Appeals of New York. All of the issues were presented to the Court of Appeals which unanimously affirmed the Appellate Division's order of reversal. Later, on motion of petitioners, the Court of Appeals amended its remittitur by adding thereto the following:

> "Upon this appeal there was presented and necessarily passed upon the question whether the respond-

ent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This Court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Just prior to the expiration of time for filing a petition for a writ of certiorari in this Court, petitioners obtained an extension of time for such filing from Associate Justice Jackson until April 12, 1945. On April 12, 1945, a petition for a writ of certiorari was filed. Certiorari was granted May 21, 1945.

Summary of Argument

POINT I. The fact that respondent received news, feature articles and other material from out of state did not bring it within the coverage of the Act. The interstate movement of these materials ended when they reached respondent. They were processed into an entirely new article before they were passed on to respondent's readers. Petitioners were not substantially engaged in commerce because they did not handle the materials received from out of state until after the interstate journey had ended. The business of publishing a local newspaper is a strictly local business. Neither respondent nor petitioners were engaged in the production of goods for commerce. The mailing of less than one half of one per cent of respondent's total circulation out of state falls within the *de minimis* doctrine because it could not possibly have the detrimental economic effect on interstate commerce that the Act was intended to control.

POINT II. Even if this Court should hold that petitioners were covered by the Act, the recoveries allowed by the Trial Court should not be reinstated because there was not suffi-

cient evidence to support petitioners' claims or the Trial Court's findings. It is well settled that in employees' suits to recover under the Act the burden of proof rests upon the plaintiff who must establish by a preponderance of the evidence the facts of overtime and the amount of overtime worked each week. Petitioners plainly failed to meet this burden. They had kept no time records and made no attempt to reconstruct any records until after this suit was filed. The record clearly shows that no credence should be given to petitioners' claims which bear every earmark of an afterthought manufactured for the occasion.

POINT III. The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect and because of the allowance of interest. The recoveries of interest cannot be reinstated because this Court has held in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697 (1945), that interest is not recoverable under Section 16 (b). Moreover, the recoveries of overtime cannot be reinstated because of the failure of the Trial Court to follow the rule laid down by this Court in *Overnight Motor Transportation Co.* v. *Missel*, 316 U. S. 572 (1942). Petitioners worked a varying work week for a fixed weekly salary so the *Missel* rule should have been applied to determine the basic hourly rate each petitioner was paid each week.

POINT IV. Under the decision of this Court in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), this Act cannot be applied to the newspaper business for it lays a direct burden on the business of the press. If a publisher is limited in his operations by the application of the burdens of the Act, he will be unable to serve his readers adequately. Moreover, newspapers which are unable to operate successfully under the Act will be forced to eliminate their out of state subscribers in order to remove themselves from any

possible application of the Act. Furthermore, this Act does not treat all newspapers alike but classifies them for the purpose of regulation. This Court has held that classification of newspapers for the purpose of regulation violates the First Amendment. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936).

POINT V. Under the terms of the Act, many of respondent's competitors in the vicinity of White Plains are exempt from the burdens of the Act. All newspapers are engaged in exactly the same business and mere size affords no basis for regulation. The application of the Act to petitioner while its competitors are exempted constitutes an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments and is in conflict with the principles announced by this Court in *Grosjean* v. *American Press Co., supra.*

POINT VI. Even if respondent was covered by the Act, petitioners cannot recover because they were exempt from the provisions of the Act as professional employees within the meaning of Section 13 (a) (1). Petitioners at all times during the period in controversy were engaged in professional work. Moreover, petitioner O'Donovan was exempt as an executive employee and petitioner Mabee was exempt as an administrative employee.

Argument

POINT I

Respondent was not engaged in commerce or in the production of goods for commerce and none of petitioners was engaged in commerce or in any process or occupation necessary to the production of goods for commerce.

The fact that respondent received news, feature articles and materials from out of the state does not, as contended

by petitioners, bring respondent within the coverage of the Act. This Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564 (1943) at page 571, stated that "• • • we cannot conclude that all phases of a wholesale business selling intrastate are covered by the Act solely because it makes its purchases interstate." And, in the companion case, *Higgins* v. *Carr Brothers Co.*, 317 U. S. 572 (1943), this Court held the Act inapplicable to a business which imported materials from out of state where the goods came to rest within the state and there was no actual or practical continuity of movement of materials from without the state to customers within the state.

Precisely that situation is presented in this case. The record shows that for a time during the period in controversy respondent obtained reports of the Associated Press and International News Service, national news gathering organizations. It is undisputed that very little either of AP or Internationtl News Service reports was used by respondent in the publication of its newspaper (R. 74, A. R. 38). Respondent concentrated on local news.

Respondent purchased certain of its supplies from outside of the State of New York, such as all of its newsprint paper and its ink (R. 48, A. R. 30). It also obtained certain news features from sources outside of the State of New York (R. 49, A. R. 31).

The record is undisputed that in the publication of a daily newspaper no news stories or features are disseminated to readers exactly as they reach the office. All news stories are first read and then selected or discarded. Most of those which came from the Associated Press and the International News Service as well as many of the features were discarded. Those that were selected were edited to suit the needs of the paper. Heads and subheads were written. Then they went to the composing room where they were set in type. After the type was set it was placed in

what is known as the page form and when the entire page form was completed a mat was made of the form, a cylinder was cast from this mat, after which the cylinder then went on the press (R. 72, A. R. 37).

In the case of pictures one additional process was needed before they reached the press. After selection they first went to the stereotype room where a flat cast was made of them for insertion on the page form. This process was a substitute in respect of pictures for the process of setting written copy in type (R. 72-73, A. R. 37). Legends for pictures were set in type and handled as other written copy.

After the round cylinder was placed on the press the ink was applied, the press was started and the newspaper came off the press.

It is also undisputed in the record that a small percentage of the advertising published by respondent was what is known as national or general advertising, that is, advertising that came from outside of White Plains from agencies engaged in placing such advertising with newspapers throughout the country. By far the greater volume of advertising was local advertising originating in White Plains and its immediate vicinity. This consisted principally of what is known as local display advertising, classified advertising, and legal advertising.

The record shows that there was no actual or practical continuity of materials from outside the state to respondent's readers within the State of New York. There was a definite "break" or termination of the interstate movement of the materials. As the Appellate Division stated, "• • • when these supplies were delivered to appellant's (respondent's here) plant they arrived at their destination and their interstate movement ended." (R. 558; A. R. 101-102.) After they reached respondent's office they were processed by independent acts of a purely local nature. It is immaterial

that respondent used these products immediately. Their interstate movement had ended.

The Appellate Division pointed out that the United States Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111 (certiorari denied, January 17, 1944; rehearing denied, May 22, 1944) rejected petitioners' contention that the receipt of news and supplies from out of state brings a newspaper within the coverage of the Act. The Fourth Circuit Court recognized that a newspaper publisher does not merely pass on to its readers the materials he has received but sells them an entirely new article composed of these materials. It said:

> "* * * there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere 'milling in transit' but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients." (138 F. 2d at page 114.)

The Circuit Court did not as petitioners state on page 12 of their brief base its decision that the rackmen in the *Schroepfer* case were not subject to the Act on the ground that they were independent contractors and not employees. On the contrary it stated that it was not necessary to decide whether or not the rackmen were employees "since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the act." (138 F. 2d at p. 112.)

But, irrespective of whether the receipt of materials from out of state was sufficient to bring part of respondent's business within the Act (and the record shows it was not),

petitioners have not proved that they were engaged in commerce.

This Court held in *Walling* v. *Jacksonville Paper Co.*, *supra*, that, to recover under this Act, an employee must show that he was substantially engaged in commerce. And, in *McLeod* v. *Threlkeld*, 319 U. S. 491 (1943), at page 497, it held that the test of coverage here "is not whether the employees' activities affect or indirectly relate to interstate commerce but whether they are in or so closely related to the movement of the commerce as to be a part of it." Therefore, as the Eighth Circuit Court of Appeals said in *Schwarz* v. *Witwer Grocery Co.*, 141 F. 2d 341 (1944) (certiorari denied May 29, 1944, 322 U. S. 753), at page 344, petitioners "must have proved that they were engaged in interstate commerce or that 'a substantial part of (their) activities' was in interstate commerce."

This they have failed to do. The interstate movement of the materials had ceased before these materials reached petitioners. A small part of petitioners' work was the preparation of these materials for publication. This work was an act of a purely local nature and not within the stream of commerce. Most of the time petitioners were not engaged in handling these materials at all but in gathering and writing the news of Westchester County.

Furthermore, respondent was not engaged in producing goods for commerce and petitioners were not engaged in any process or occupation necessary to the production of goods for commerce.

This Court has held that the business of preparing, printing and publishing a newspaper is peculiarly local and distinct from its circulation, whether or not that circulation crosses state lines. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). See also *Blumenstock* v. *Curtis Publishing Co.*, 252 U. S. 436 (1920).

The record shows and the Appellate Division found that "The conclusion is irresistible that appellant (respondent here) was engaged in a strictly local as distinguished from a national activity, i. e., the local business of publishing a local newspaper." Thus, respondent's business falls within the category of local business which Congress left to the protection of the states. *Walling* v. *Jacksonville Paper Co., supra.* And, as this Court recently pointed out in *10 East 40th Street Building, Inc.* v. *Charles Callus, et al.*, 89 L. ed. 1244 (advance opinions) (1945), courts must be alert "not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation."

The mailing of less than one-half of one per cent of its total circulation to subscribers temporarily out of the state did not bring respondent's business within the purview of the Act. The Appellate Division correctly held that this came within the *de minimis* doctrine.

This Court, in *NLRB* v. *Fainblatt*, 306 U. S. 601 (1939), recognized that there were cases arising under the National Labor Relations Act in which the courts would apply the *de minimis* doctrine. Since, as the Court pointed out in *A. B. Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942), and *Walling* v. *Jacksonville Paper Co., supra*, the Fair Labor Standards Act is not as broad in its scope as the National Labor Relations Act, it is clear that this doctrine could be applied to the present case.

In determining whether the *de minimis* doctrine should be applied to cases arising under the Fair Labor Standards Act, it is essential to keep in mind the purpose of the Act. As this Court has stated, "the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced under the prescribed or better

labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local business by competition made effective through interstate commerce." *United States* v. *Darby*, 312 U. S. 100 (1941) at page 122. On the record herein, it is plain that the trifling out of state circulation which is purely incidental to respondent's local service could not possibly have a substantial economic effect on interstate commerce. The papers going out of state do not compete with the local newspapers in the communities they enter and could not possibly impair or destruct the business of those newspapers. It does not fall within the category of competition by a small part which may affect the whole which this Court held to be covered by the Act in *United States* v. *Darby*, *supra*.

With the purpose of the Act in mind, the cases cited by the petitioners on pages 38-39 of their brief may be distinguished from the present case.

Dorner v. *Iaco Clothes, Inc.*, 7 Wage and Hour Reporter 35 (N. D. Illinois, December 24, 1943), is not controlling here for the court recognized that there would be cases arising under the Act in which the *de minimis* doctrine would be applied but stated that it could not be applied there where a "substantial part" of the employer's products flowed in interstate commerce. Likewise, it was not applicable in *Walling* v. *Partee et al.*, 6 Wage and Hour Reporter 863 (M. D. Tennessee, May 26, 1943) where 15.16 per cent of the company's products went out of state nor in *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40 (W. D. Tennessee, May 3, 1940) where a substantial part (over 20 per cent) of the products of the company and its parent company were destined for interstate commerce.

In *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (C. C. A. 6th, 1943), the court did not specifically discuss the *de minimis*

doctrine but held that the employees were covered because a "substantial portion" of the ice produced was sold for use in interstate commerce. And, in *Muldowney* v. *Seaberg Elevator Co.*, 39 F. Supp. 275 (E. D. New York, June 4, 1941), the court said that, while the volume of out of state business was small as compared with the whole, it was substantial. In *Philips* v. *Star Overall Dry Cleaning Co.*, 7 Wage and Hour Reporter 92 (S. D. New York, January 6, 1944), the court held that employees of a laundry were substantially engaged in production of goods for commerce because the laundry obtained 80 per cent of its business from another company which was engaged in interstate commerce to the extent of five per cent of its business.

In *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4th, 1943), defendant's chief business was a retail lumber business but it also operated a small manufacturing business, 25 per cent of whose products were shipped in interstate commerce. The court held the manufacturing business was covered by the Act. A similar situation was presented in *Elmore* v. *Cromer & Beaty Co., Inc.*, 6 Wage and Hour Reporter 861 (W. D. South Carolina, August 2, 1943).

The court pointed out in *Strand* v. *Garden Valley Telephone Co.*, 6 Wage and Hour Reporter 1087 (D. C. Minnesota, September 27, 1943) that the defendant was not operating a fundamentally intrastate business having minor incidents of interstate commerce but was directly and immediately engaged in the business of interstate communication, holding himself out to the public as such. The Appellate Division distinguished *Schmidt* v. *The Peoples Telephone Union of Maryville*, 138 F. 2d 13 (C. C. A. 8th, 1943), from the case at bar on the same ground.

In *Ling* v. *Currier Lumber Co.*, 50 F. Supp. 204 (E. D. Michigan, April 2, 1943), the court said that where a company is engaged in interstate commerce every employee who

contributes to production is covered but where a company is engaged in intrastate business and has only casual connection with interstate business the *de minimis* doctrine applies unless the employee can show a substantial part of his labors was utilized in interstate commerce. It was this distinction the court was referring to in the statement quoted on page 40 of petitioners' brief. And, in *McKeown* v. *Southern California Freight Forwarders*, 52 F. Supp. 331 (S. D. California, September 29, 1943), *Drake* v. *Hirsch*, 40 F. Supp. 290 (N. D. Georgia, August 8, 1941), and *Nelson* v. *Southern Ice Co.*, 1 W. H. Cases 787 (N. D. Texas, September 27, 1941), the court, in each case, found that a substantial part of the employee's time was spent in the interstate part of the employer's business.

On the other hand, in a number of cases arising under the Act, the courts have applied the *de minimis* doctrine by holding that where the interstate business of the employer constitutes only a small portion of the entire business, where it has no substantial effect on interstate commerce, and where it is not an integral part of the service rendered the Act does not apply. *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Florida, March 18, 1941); *Rauhoff* v. *Henry Gramling & Co.*, 42 F. Supp. 754 (E. D. Arkansas, August 22, 1941); *Zehring* v. *Brown Materials*, 48 F. Supp. 740 (S. D. California, January 19, 1943); *Cron* v. *Goodyear Tire & Rubber Co.*, 49 F. Supp. 1013 (M. D. Tennessee, April 28, 1943); *Sapp et al.* v. *Horton's Laundry*, 56 F. Supp. 901 (N. D. Georgia, January 18, 1944); *Cody et al.* v. *Dossin's Food Products*, 8 Wage and Hour Reporter 989 (E. D. Michigan, October 5, 1945.)

The Appellate Division was correct in following this line of cases and in distinguishing the present case from cases in which the courts have refused to apply the *de minimis* doctrine because the interstate business, although small in amount, had a substantial effect on interstate commerce

and was an integral part of the business. The opinion shows that the Appellate Division carefully analyzed these two lines of cases and recognized the essential difference between the two. It recognized that the present case would come within the *de minimis* doctrine because the out of state circulation was not an essential part of the service respondent rendered its local subscribers.

Here, as the Appellate Division found, respondent "had no desire and made no effort to secure 'out-of-state' circulation, although during the summer its newspaper was mailed to subscribers who were temporarily out of the State on vacation or absent from the State while at school or in the armed forces." It correctly held that this interstate business was "not regular but casual; not an integral but only an incidental part of its essentially local service." The Court of Appeals correctly upheld this ruling.

Point II

No credence should be given to petitioners' claims which bear every earmark of an afterthought manufactured for the occasion.

The recoveries allowed by the Trial Court should not be reinstated because there was not sufficient evidence to support petitioners' claims or the Trial Court's findings.

In employees' suits to recover overtime wages under the Act herein the courts have uniformly applied the well established rule that the burden of proof rests upon the plaintiff who must establish by a preponderance of evidence the facts of overtime and the amount of overtime worked each week. New York state courts have so held, *Ralston* v. *Karp Metals Products Co.*, 179 Misc. 282, 38 N. Y. S. 2d 764, 2 W. H. Cases 1057 (New York Supreme Court, Kings County, November 17, 1942) and *Rosen* v. *Weismann*, 2 W. H. Cases 1055 (New York City Court, Kings County, November 17, 1942); federal courts have so held, *Jax Beer Co.* v. *Redfern*,

124 F. 2d 172 (C. C. A. 5th, 1941); *Lowrimoore* v. *Union Bag & Paper Corporation*, 30 F. Supp. 647 (S. D. Georgia, November 15, 1939); *Wilkinson* v. *Noland Co.*, 40 F. Supp. 1009 (E. D. Virginia, September 30, 1941); *Feldman* v. *Roschelle Brothers, Inc.*, 49 F. Supp. 247 (S. D. New York, December 30, 1942); *Collins* v. *Burton-Dixie Corporation*, 53 F. Supp. 821 (W. D. South Carolina, February 15, 1944); *Toppin* v. *12 East 22nd Street Corporation*, 55 F. Supp. 887 (S. D. New York, January 12, 1944); *Griswold* v. *Rosenstock*, 8 Wage and Hour Reporter 1039 (S. D. New York, October 15, 1945).

In this case, petitioners failed to sustain the burden of proof as defined by the courts of New York and the courts generally. The Trial Court erred (a) in finding that "by a fair preponderance of the believable evidence" petitioners performed overtime services for respondent and that the minimum overtime hours they claimed were actually spent in the course of their employment and (b) in disregarding the substantial evidence to the contrary as it appeared on the face of the specious claims of petitioners and from their testimony.

It should be constantly borne in mind that the trial developed a wide discrepancy between the claims advanced in the amended complaint and in the proof offered by petitioners. Throughout the entire period of the trial this substantial variance between allegation and proof left the evidence as to the claimed overtime in an indefinite, vague and speculative state. Respondent objected to the admission of such evidence as lacking in rational probative force and at all times met the duty of refuting the specious claims by showing that they were utterly improbable, unreasonable, and therefore entitled to no credence.

Irrespective of whether, as the Trial Court said, the method of proof adopted by petitioners was the only method by which they could attempt to establish their claims for

overtime or that no superior evidence was available or procurable—which respondent does not admit but which may be assumed arguendo—it still remains true that upon petitioners rested the burden of establishing their claims by a preponderance of credible evidence. This burden they plainly failed to meet.

The Trial Court also erred in saying that

> "Defendant (respondent) cannot be heard to complain for its own admitted neglect or refusal to obey the statute and make, keep and preserve accurate records of the wages and hours of plaintiffs (petitioners)." 41 N. Y. S. 2d, at page 538.

Petitioners must recover on the strength of their own case. In *Feldman* v. *Roschelle Brothers, Inc., supra,* the court said:

> "While the law requires the defendant to keep a record of overtime, the failure of the defendant to so do is not evidence upon which I can compute these plaintiffs' overtime. The burden was on these plaintiffs to prove that they worked overtime and how much overtime they worked. The evidence as to the claimed overtime for any of the periods is vague, uncertain and does not carry the quality of proof to induce conviction. I cannot make a guess as to when the plaintiffs worked overtime or for how long." (49 F. Supp. at pages 249-250.)

The court accordingly dismissed the complaint. See also, *Wilkinson* v. *Noland Co., supra; Collins* v. *Burton-Dixie Corporation, supra.*

In the *Ralston* case, *supra,* the court was not satisfied from the evidence and the circumstances surrounding the trial that the respondent had met the burden, saying that the employee

> "kept no record of the hours he claims he worked each week and accepted his wages without protest, and for four years delayed asserting his claim.

* * * * * * *

"Assuming arguendo that there were times when plaintiff worked more than the specified hours fixed by law, the testimony given by him is indefinite and at most a mere estimate based upon an alleged course of conduct or overall average a number of years back."

The court granted appellant's motion for judgment dismissing the complaint on the merits.

In the *Rosen* case, *supra*, Judge Russell, Official Referee, gave judgment for defendant, saying:

"Plaintiff brought this action without prior claim or indication of the existence of a claim, nearly a year after his employment terminated. He produced no records whatsoever of any alleged overtime, relying only on vague, general and wholly speculative testimony that he always worked more than the number of hours provided for in the contract [54 hours, no provision for overtime].

* * * * * * * *

"This claim bears every earmark of an afterthought manufactured for the occasion. The computation in the complaint and in the bill of particulars, the time element for the various days being computed wholly from plaintiff's memory at a period of over a year after his discharge, is based upon alleged overtime of exactly the same number of hours each week, manifestly impossible, bearing in mind that plaintiff was employed on a route of which the amount of business fluctuated from day to day. * * *

"Even under the strict requirements of the Fair Labor Standards Act, the courts have held that where an employee makes no claim for overtime compensation until after his discharge, such claim will be carefully scrutinized and proof will be required on the part of the employee of specific instances of overtime actually spent during a workweek, based upon contemporaneous records or other definite proof."

Whether credibility is for the judge or for the jury, the principles that "The law demands proof and not mere surmises" and that "insufficient evidence is, in the eye of the law, no evidence" should govern. Compare remarks of Mr. Justice Cardozo in *Matter of Case*, 214 N. Y. 199, 203 (1915); *Bond* v. *Smith*, 113 N. Y. 378, 385 (1889).

Neither a judge nor a jury should be left to guess or conjecture.

Nor is credibility dependent upon the number of witnesses or the mere quantity of evidence.

It will be recalled that each one of the petitioners in this case in his complaint claimed that he worked at least a certain definite number of hours above the maximum limit of the law each week during the period of the controversy; that no credit was given to the employer for the two weeks vacation with pay given to each employee each year during his employment; that no credit was given to the employer for the seven specified holidays in the year; that no credit was given to the employer for time taken off on account of illness during which each petitioner was paid when away from the office on account of illness.

None of petitioners had kept any current records of his employment during the time of his employment and none of them was able to produce any such records. Each on cross examination testified that such tabulations as he offered in support of his claims were prepared after the filing of the suit and largely on the basis of memory while checking the files of respondent's newspaper, the White Plains Daily Reporter.

These tabulations admitted into evidence over objection are particularly revealing in many respects. To illustrate: With the exception of the petitioner Trow each and every one of the petitioners claimed an even number of hours overtime on each one of his claimed overtime assignments. Trow broke certain of his assignments down to half hour

periods. Yet the record is undisputed that newspaper work is not performed in that way. It is also undisputed that no two men would spend exactly the same amount of time on identical stories or that a particular story would take exactly one-half hour, one hour, two hours, three hours, four hours or any particular number of hours to cover.

Petitioner O'Donovan's claims as to overtime as illustrated by Plaintiffs' Exhibit No. 16 are fantastic.

Mr. O'Donovan spent his entire newspaper career in White Plains with respondent. Starting in as a reporter, he rose to the position of City Editor which position he held throughout the period in controversy. He was active not only in military affairs during peacetime but in civic affairs. Concurrently with his service on respondent's newspaper he served in the New York State National Guard and just as he advanced on the newspaper from cub reporter to City Editor, he advanced in the Guard from private to Captain and Adjutant of his regiment. He testified that he was a member of the Citizens Committee on Housing, the County Airport Committee, the Advisory Board of the Symphony Orchestra, the Civic and Business Federation, the White Plains Defense Council, as well as several Republican Clubs (R. 292-293). He further testified that the only reason he belonged to any of these, except the White Plains Defense Council, was because of his service on the newspaper.

In addition to attending meetings of the foregoing organizations O'Donovan frequently spoke before other bodies in White Plains and the newspaper stories covering his speeches and his activities referred to him as "Captain W. L. O'Donovan, City Editor of the White Plains Daily Reporter."

At no time while he was employed by this newspaper did he ever make a claim for extra compensation or overtime

pay because of his civic and military activities. It was not until nearly two years after his discharge in December, 1940, that he filed the suit herein and it was not until more than two years after his discharge that he attempted to reconstruct any records on which to base his claim. He admitted on the stand that he had kept no current records and that his tabulation of overtime claims was worked out in the method heretofore described. Furthermore, when that tabulation was offered in evidence, Mr. O'Donovan specifically testified that he did not charge time spent on the White Plains Defense Council to the newspaper but that he did charge the time spent in his civic activities to the newspaper in the claim he presented to the court below.

Examination of Plaintiffs' Exhibit No. 13, which is O'Donovan's purported tabulation of overtime, reveals that on August 13, 1940, he spoke before the Rotary Club on National defense and on August 14, 1940, he spoke before the Exchange Club on National defense and more than two years after sought to charge three hours overtime for those speeches. This exhibit further shows that he attended a meeting of the Defense Council on August 21 and lists one hour overtime incident to that. The exhibit still further shows that during the week August 22-28 he attended several Defense Council meetings at night and the exhibit claims 12 hours overtime for those meetings. Going back to 1939 and before the National defense situation became particularly acute the same exhibit shows that on January 19, 1939, Mr. O'Donovan was a guest at a dinner given in honor of Major George Fielding Eliot, a noted military authority and commentator. He said nothing to his employer about extra compensation for attending that dinner at that particular time but more than four years later he comes into court, notwithstanding his alleged peace time interest in military affairs and national defense, and asserts a claim for two hours overtime incident to the Eliot

dinner. Of course, the record shows that Mr. O'Donovan resigned his commission in the Guard after it became known that the Guard was going to be called into active service and just a few weeks before it actually was called.

On direct examination O'Donovan testified that he attended many meetings in behalf of his employer, respondent herein, but that:

> "I have taken no credit or made no claim for overtime except for the time spent in the office preparing the stories or otherwise, as far as the activities affected the Daily Reporter" (R. 294).

On page 519, Exhibit 13, O'Donovan claims two hours overtime for attending a Federation Dinner on January 23, 1940. Under that claim appears this note: "Norton Mockridge wrote story."

Mockridge, another petitioner, filed a similar tabulation in support of his claims for overtime (Plaintiffs' Ex. 5). Reference to the Mockridge exhibit shows that he claims two hours overtime incident to his writing the story of that particular Federation Dinner. Courtney M. Mabee, another petitioner, also filed a similar exhibit tabulating his claims of overtime (Plaintiffs' Ex. 3). Reference to page 3 of the Mabee exhibit shows that he claims four hours overtime for attending the self same dinner. Two queries naturally present themselves:

1. If as O'Donovan testified he only charged the time he spent in the office writing the story why did he make this claim for this particular dinner?

2. What did Mabee do to justify a claim of four hours overtime for attending the same dinner when according to O'Donovan's exhibit that was not challenged by either Mabee or any other petitioner Mockridge also attended the dinner and actually wrote the story?

The record is undisputed that each one of the employees who are petitioners in this case was free to come and go as he pleased and to cover his assignment according to his own best judgment.

Their exhibits reveal some further interesting facts on their method of covering assignments. O'Donovan was the City Editor of the paper and Mabee for a time during the period in controversy the Assistant City Editor. On the very first day the law became effective—October 24, 1938—Mabee claims (Plaintiffs' Ex. 3) four hours overtime for attending a rally in support of Judge Bleakley of Westchester County who was then the Republican candidate for governor of New York, while O'Donovan claims one hour overtime for attending the same rally (Plaintiffs' Ex. 13). On November 28, 1938, Mabee claims he spent five hours overtime attending the County Budget hearing (Plaintiffs' Ex. 3) whereas O'Donovan claims three hours for the identical assignment (Plaintiffs' Ex. 13). On December 15, 1938, a dinner was given in honor of the football squad of the White Plains High School. Various members of the newspaper staff attended that dinner and O'Donovan was toastmaster. O'Donovan claims five hours overtime for attending the dinner and acting as toastmaster (Plaintiffs' Ex. 13). Other similar instances can be found throughout these exhibits, the foregoing of which are just illustrative of the type and nature of the claims made by the petitioners.

Walter V. Hogan, Vice President and Treasurer of respondent company and Editor of its newspaper during the period in controversy was ill during several months of 1939. While he was away the petitioner O'Donovan was in full and complete charge of the editorial and news departments of the newspaper. Hogan was away four weeks during February and March and 15 weeks beginning May 1 on account of illness (R. 367). O'Donovan never presented a

claim for overtime during these periods or until he filed his suit. He never specified the overtime he claimed to have worked until he took the stand. He now seeks a vast amount of overtime pay for work he claims he did while one of the chief executives of the paper.

At all times O'Donovan laid out the work of others as well as what he did and never during the entire period in controversy received specific assignments from the Editor (R. 363).

In *Mt. Clemens Pottery Co.* v. *Anderson*, 149 F. 2d 461 (C. C. A. 6th, 1945), the Circuit Court of Appeals reversed a decision of the District Court granting a judgment for overtime pay alleged to be due under the Act. The District Court had reversed the findings of the Special Master that the plaintiffs had not established by a fair preponderance of evidence a violation of the Act and had applied an arbitrary formula for establishing the overtime worked. The Circuit Court said:

> "• • • the burden rested on each of the plaintiffs here • • • to show by evidence, not resting upon conjecture, the extent of overtime worked. It does not suffice for the employee to base his right to recovery on a mere estimated average of overtime worked. To uphold a judgment based on such uncertain and conjectural evidence would be to rest it upon speculation" (149 F. 2d at page 465).

And, in *Epps* v. *Weathers*, 49 F. Supp. 2 (S. D. Georgia, January 11, 1943), where the plaintiffs had not kept any records of overtime but tried to recall the overtime worked during a period of four years, the court dismissed the complaint, saying

> "The burden is in the plaintiffs to establish by a preponderance of the evidence the number of hours worked and the amount of wages due; and the evidence to sustain this burden must be definite and certain.

> • • • Not only is their evidence as to the hours they worked unconvincing, but I think it would be impossible for them to remember how long or how often they worked in the absence of some record made contemporaneously." (49 F. Supp. at page 5.)

Likewise, in *Toppin* v. *12 East 22nd Street Corporation, supra,* where the plaintiffs had delayed in presenting any claim for overtime, the court found that they had not offered sufficient proof of overtime to recover. The court said:

> "Such delay is so indicative of the claim in suit being unfounded that, in order to establish the contrary, clear and convincing proof is demanded." (55 F. Supp. at page 889.)

In this case the evidence is undisputed that none of the petitioners herein kept any records of his hours at the time he was employed; that none attempted to reconstruct any such records until after suit was filed; and that all of them made such reconstructions as they attempted chiefly on the basis of memory. Mabee in fact said there were no records except in his head (R. 106). He admitted organizing the suit and assisting the other petitioners (R. 98).

Mabee testified that there were only about nine employees in the news room (R. 46) and that when an employee was discharged no one was hired to replace him (R. 61). The record shows without dispute that the number of employees ranged from 13 to 16 at all times during the period in controversy and that when discharges were made new employees were hired (R. 154-156). The record further shows that the number of employees in the news department for a paper the size of respondent's newspaper was much larger than average (R. 449). And still further that the work of each could have been done within a 40 hour week (R. 366; 423; 425-426) and that O'Donovan was directed to keep the men within 40 hours (R. 366-423).

As has hereinbefore been pointed out and as is illustrated by the exhibits offered by petitioners, two, three and even four of these employees would go to the same event. None of them claimed overtime during the period of his employment or kept any record of the time spent whether on business for respondent's newspaper or for his personal pleasure. Yet more than eighteen months after respondent's newspaper suspended publication, petitioners came in and made these fantastic claims. Again the record shows that such duplicate coverage was wholly unnecessary (R. 368).

The record shows that each one of the petitioners based his claims for overtime on the basis of a workweek of 40 hours even when the law was 44 and 42 hours.

When petitioners admitted, as each and every one of them did on the stand, that they kept no time records, that they had not attempted to reconstruct any records until after they filed this suit and then only in anticipation of trial and out of their heads, there was no occasion for respondent to combat such testimony other than by bringing out the facts as to the speciousness of petitioners' claims through their own mouths and their own exhibits.

Point III

The recoveries granted by the Trial Court should not be reinstated because the computation of overtime was incorrect.

Even if this Court should reverse the Court of Appeals of New York, it should not reinstate the recoveries granted by the Trial Court.

The Trial Court rendered judgment in favor of each of the petitioners for their claimed overtime compensation in a sum for each computed to include (a) the amount of claimed overtime at the rate of one and one-half times the

regular rate at which each petitioner was employed, "regular rate" being construed by the Trial Court to be the employee's weekly salary divided by forty hours, *plus interest*, plus an additional equal amount as liquidated damages, and (b) attorney's fees and costs.

The recoveries of interest cannot be reinstated for this Court held last term in *Brooklyn Savings Bank* v. *O'Neil, supra,* that interest is not recoverable on judgments obtained under Section 16 (b).

Moreover, the recoveries for overtime cannot be reinstated because in approving petitioners' method of computing overtime the Trial Court misconceived the effect of the interpretation of Section 7 of the Act by this Court in *Overnight Motor Transportation Co.* v. *Missel, supra.*

Petitioners' "compilations" of overtime hours worked and of amounts alleged to be due, inclusive as they are in fact, are in addition wholly inadequate as a matter of law.

Section 7 (a) of the Act provides that no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than prescribed unless such employee receives compensation for excess hours

> "at a rate not less than one and one-half time the regular rate at which he is employed."

This Court in *Overnight Motor Transportation Co.* v. *Missel, supra,* has established the method of determining regular rate of pay in the case of employees who work a varying number of hours each week on a fixed weekly salary basis. For such employees, regular rate of pay equals the weekly salary in any particular week divided by hours actually worked in that week.

Petitioners adopted another method. Instead of using for a divisor hours alleged to have been worked in each of the weeks in controversy as required by the Act, petitioners

used the figure of 40 hours for all weeks because, as Mabee testified, "that was the workweek we were supposed to have in reporting" (R. 83). Notwithstanding this Court's ruling in the *Missel* case, Judge Hinkley upheld this method.

A single example will suffice to show the gross error in petitioners' method of computation.

O'Donovan claimed to have worked a total of 63 hours during the week October 27, 1938, to November 2, 1938. During the same period O'Donovan's salary was $105 per week.

If petitioners' method of computation were followed, O'Donovan's regular rate of pay would be $2.63 per hour ($105.00 ÷ 40) and the overtime rate would be $1.32. For the 19 hours of overtime, then, petitioner O'Donovan demands $75.05 (19 × $3.95).

Under the rule of the *Missel* case, however, the amount due for such alleged hours of overtime is $15.96, computed as follows:

$105 ÷ 63 = $1.67, regular rate of pay.
$1.67 ÷ 2 = $.84, overtime rate of pay.
19 × $.84 = $15.96, unpaid overtime.

It is thus apparent that failure to follow the rule of this Court in computing overtime results in an excess demand for a single petitioner for a single week in the sum of $59.09, or $118.18 with the addition of liquidated damages as demanded.

The Trial Court erred in holding that respondent had entered into contracts of employment with petitioners that each employee's salary should be for a forty hour week and that, therefore, each employee was employed at a basic hourly rate which could be determined by dividing the weekly salary by forty. Each contract of employment was, in fact, an agreement that each employee was to be paid a certain sum each week regardless of the hours he worked.

The hours worked each week fluctuated because of the nature of respondent's business and because of the methods petitioners used in doing their work. Petitioners, therefore, were employed at a basic weekly salary for a varying work week so the *Missel* rule should have been applied to determine the basic hourly rate each petitioner was paid.

This is substantiated by later decisions of this Court and by decisions of district and circuit courts of appeals in which the *Missel* rule has been followed. See, *Landreth* v. *Ford, Bacon & Davis,* 147 F. 2d 446 (C. C. A. 8th, 1945).

Point IV

The Act Contains a Particular Form of Abridgment of the Constitutional Guaranty of a Free Press

The Appellate Division found that it was unnecessary to pass upon the constitutional issues in this case because of its finding that none of the plaintiffs was engaged either in commerce or in producing goods for commerce. There can be no controversy with that finding. Even so, the attempted application of the Act does raise important constitutional questions which were submitted to the courts below and they will be discussed briefly.

One of these is whether Congress in the exercise of its regulatory powers derived from Article I, Section 8, Clause 3 of the Constitution can nullify the prohibition against restraints of the press embraced in the First Amendment to the Constitution.

The Act here in controversy is not a general law affecting all persons alike. Section 13 of the Act exempts many types of employees from the so-called "benefits" of the Act. Furthermore, it exempts numerous entire businesses and industries from the burdens of the Act. Still further, as originally enacted, only one business in the entire range of

business and industry was classified in this Act for the purposes of regulation.

That business was the newspaper publishing business.

Under the provisions of Section 13 (a) (8) all weekly and semi-weekly newspapers with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published, are exempted from the minimum wage and overtime provisions of Sections 6 and 7 of the Act. All other newspapers whether weekly, semi-weekly, tri-weekly, daily, Sunday or daily and Sunday are subjected to the burdens of Sections 6 and 7 of the Act.

The record shows that of a total of 13,476 newspapers published in 1938, daily, daily and Sunday, weekly, semi-weekly and tri-weekly, 10,379, or 77 per cent of the total, had circulations under 3,000, while 11,496, or 85 per cent of the total, had circulations under 5,000. In the weekly, semi-weekly, and tri-weekly fields 9,775 or 91 per cent of the total in these fields, had circulations under 3,000. In the daily field 521, or 25 per cent of all dailies, had circulations under 3,000 and in the Sunday field 101, or 17 per cent of all Sundays, had circulations under 3,000.

In the group between 3,000 and 5,000 circulation, 489 were weeklies and 467 dailies.

In the group between 5,000 and 10,000 circulation, 233 were weeklies, semi-weeklies and tri-weeklies and 455 dailies. Only 654 dailies and 218 weeklies, semi-weeklies and tri-weeklies had over 10,000 circulation. Practically all of 9,755 weekly and semi-weekly newspapers have less than 3,000 circulation. These, constituting 72 per cent of all newspapers published in the United States and 91 per cent of all weekly and semi-weekly newspapers published in the United States, are exempted from the burdens of the Act (Defendants' Exhibit A—Small Daily Newspapers Under Fair Labor Standards Act).

Analysis of the provisions of Section 13(a)(8) shows that Congress classified the press for the purposes of the regulation provided in this Act on the basis of volume of circulation, frequency of issue and area of distribution.

A general law applying to all persons alike if it lays a direct burden on the business of the press must be nullified as to the press by reason of the prohibition against restraint contained in the First Amendment. *Murdock* v. *Pennsylvania, supra.*

This Act lays a direct burden on the press. The business of preparing and printing a daily newspaper is peculiar in that it demands a high degree of flexibility in operation. If a publisher is limited in his operations by the application of the burdens of this Act, he will be unable to serve his readers adequately.

Newspapers which are unable to operate successfully under this Act will be forced to restrict their circulation. Respondent could have removed itself wholly from the possible application of this law by eliminating its few out-of-state subscribers. Thus, the effect of the application of this Act to the newspaper publishing business is to restrict circulation. Restriction of circulation violates the guaranty of the First Amendment. *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Near* v. *Minnesota*, 283 U. S. 697 (1931); and *Grosjean* v. *American Press Co., supra.*

This Act regulates the press by classifying it. If Congress has the power to classify the press as it has done here it can exercise that power so as to benefit or burden any portion of the press it so desires. This is obvious from the very nature of the factors used by Congress for its classification.

The use of one of these factors, the only one used in fact by the State Legislature of Louisiana, was condemned by this Court in *Grosjean* v. *American Press Co., supra.*

The notorious Huey Long legislature when it sought to penalize those newspapers in Louisiana which were opposed to the Long regime enacted a tax law aimed at silencing the anti-Long press. The legislature classified the press of Louisiana on the single basis of volume of circulation, levying the tax on all newspapers with a circulation in excess of 20,000 per week and exempting all newspapers in Louisiana with a circulation of less than 20,000 per week.

In this Act Congress has not only applied volume of circulation as used by the Louisiana legislature as one of its factors for classifying the press but has added two more, namely, frequency of issue and the area in which a newspaper is distributed. The very use of these factors serves to restrict circulation and deprive the people of their right to information which our forefathers guaranteed them under the First Amendment.

That Amendment prohibits any such exercise of the power here asserted by Congress.

Point V

Application of Sections 6 and 7 of the Act to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination against respondent in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution, in conflict with the principles announced in Grosjean v. American Press Co., supra.

As has been pointed out hereinbefore Section 13(a)(8) of the Act classifies the press on the basis of volume of circulation, frequency of issue and area of distribution in such a way as to exempt from the burdens of Sections 6 and 7 more than 72 per cent of all newspapers published in the United States.

Among the newspapers freed from those burdens are many weekly newspapers published in the vicinity of White

Plains. The newspaper published by respondent was engaged in identically the same business as the weekly newspapers with circulations of less than 3,000 with which it competed. Whether a newspaper be weekly, semi-weekly, tri-weekly, daily, daily and Sunday or Sunday only, its business is exactly the same as that of all other newspapers. That business is the gathering and dissemination of three classes of information in the printed form—news, editorial comment and advertising. Mere size affords no basis for regulating certain newspapers and exempting all others.

Therefore, it follows that the application of Sections 6 and 7 to respondent's business would constitute an unreasonable, arbitrary and injurious discrimination in violation of its rights as guaranteed by the First and Fifth Amendments to the Constitution and in conflict with the principles announced in *Grosjean* v. *American Press Co., supra.*

Point VI

Petitioners were exempt from the provisions of the Act herein as professional employees within the meaning of Section 13 (a) (1).

Even if this Court should hold that respondent were subject to the Act it should hold that petitioners are not entitled to recovery because they were exempt from its provisions as professional employees within the meaning of Section 13 (a).

Section 13 (a) (1) of the Act herein provides that Section 7 shall not apply with respect to

> "any employee employed in a bona fide executive, administrative, professional or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator)."

Under this provision of law the Administrator of the Wage and Hour Division has asserted a vast power over

the very existence of the newspaper publishing business. Through his regulations he has asserted power so to define types of employees intended by Congress to be exempt as to deny the intended exemption to an entire business or industry.

The Administrator's regulations have proved unworkable. As applied to the newspaper publishing business the definitions are arbitrary, capricious and unreasonable.

It is submitted that the Trial Court erred in holding that no one of the petitioners performed services which bring them within the exemption of Section 13 (a) (1) of the Act. It should also be noted that in effect the Trial Court gave the Interpretative Bulletins of the Wage and Hour Division the force of law rather than weight and persuasiveness.

For example, it has been held that the Administrator exceeded the powers conferred on him by so defining executive employees as to deny exempt status to any employee regardless of the nature of his duties who earns less than $30.00 per week. *Devoe* v. *Atlanta Paper Co.*, 40 F. Supp. 284 (N. D. Georgia, July 31, 1941); *Tune* v. *Roselawn Florists*, 1 W. H. Cases 784 (N. D. Texas, September 24, 1941); *Buckner* v. *Armour & Co.*, 53 F. Supp. 1022 (N. D. Texas, July 22, 1942).

Petitioners at all times during the period in controversy were in fact engaged in professional work.

The work was predominantly intellectual in character. Each petitioner used his educational background and his acquired intimate knowledge of local affairs in order to bring to his readers an intelligent report and interpretation of the news events of the day. Each petitioner exercised both literary skill in translating events to written form and news judgment in assessing the space value of news.

Petitioners' work was varied in character as opposed to routine mental, manual, mechanical or physical work. News is constantly changing from day to day. Petitioners

probably had as much variety in the news stories they handled each day as in the cases which the physician or lawyer may handle in any given day.

The work of each petitioner required the constant exercise of discretion and judgment. Petitioners had a wide range for the exercise of discretion and individual judgment (R. 158; 190). They were not given detailed instructions on the methods of accomplishing their assignments (R. 275) nor explicit directions as to the amount of time to be consumed in gathering facts (R. 87; 158). They were required only to meet the 1:30 deadline.

Those petitioners who edited the news gathered by others constantly had to use discretion in determining what facts should be brought into the lead, what facts were essential to the story and what might be eliminated. Each used his literary ability in fashioning the story as reported into a finished chronicle. Even in the writing of heads, it was necessary to employ trained judgment as to news value and individual style in compressing the facts into the narrows limits of a headline (R. 81-83). It is the individual skill and judgment applied to each assignment or story which determines professional character.

Nor was petitioners' work of such character that the oufput produced or the result accomplished could be standardized in relation to a given period of time. The employees in respondent's mechanical department could be expected to set so many lines of copy per day. Not so the petitioners. Mabee or Barnum according to their testimony might spend many hours on a single assignment and return with a story amounting to only a few words (R. 81; 190). They might spend only a few minutes gathering the material for a story several times that length. Barnum testified that before reaching the office he might spend several hours covering police stations, hospitals and

other public news sources without discovering a single newsworthy event (R. 166).

Mabee while editing the incoming news at the copy desk might spend an hour on one story and the next hour on a dozen shorter stories. His work would depend upon the uncontrollable breaks of the news.

It is thus apparent that irrespective of the Regulations of the Administrator, petitioners were in fact engaged in work of a professional character. At the time of the enactment of the Act, it was generally recognized that employment in the field of gathering, writing and editing news is professional in character. If the Administrator's definitions fail to recognize that fact, they pervert the intention of Congress to exempt from the operation of the Act all professional employees and thus exceed the scope of the powers delegated.

Petitioner O'Donovan was exempt from the wage and hour provisions of the Act as an executive as well as a professional employee. As City Editor he was responsible to his employers for managing the preparation of the news pages of the Reporter for each day. During a long period of time when the Editor was away on account of illness he was in complete charge of all the editorial content of the newspaper including the editorial page as well as the news pages. He gave assignments to the reportorial staff in the gathering of news either himself or by delegating authority to Mabee, the Assistant City Editor. O'Donovan's recommendations on hiring and firing and on salary questions were generally accepted by the Editor. He consistently exercised discretion in carrying out the policies of the newspaper and owned a small amount of stock in respondent company.

Petitioner Mabee during the greater portion of the period involved in this action was Assistant City Editor. Under

the authority delegated to him he gave assignments to reporters (R. 78) and handled many details for the executives including the disposition of complaints and the transaction of other matters of business (R. 45-46, 68). Under only general supervision, he directed the work of members of the news staff at all times, even when he ceased being Assistant City Editor and became Sports Editor in which position he had an assistant whose work he supervised and to whom he gave assignments (R. 95).

In the light of the foregoing facts, Mabee was an employee engaged in an administrative capacity and exempt from the operation of Section 7 of the Act.

It is therefore submitted that each and every petitioner was at all times exempt from the operation of the Act by reason of the provisions of Section 13 (a) (1) thereof.

Conclusion

Wherefore, it is respectfully submitted that the judgment of the Court of Appeals of New York should be affirmed and the complaint of petitioners herein dismissed.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The constitutional provisions involved are Article I, Section 8, Clause 3, of the Constitution of the United States and the First and Fifth Amendments of the Constitution of the United States.

Article I, Section 8, Clause 3, of the Constitution of the United States provides that:

"The Congress shall have power * * * to regulate Commerce * * * among the several States * * *."

The First Amendment to the Constitution of the United States provides that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution of the United States provides that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Regulations of the Administrator

Pursuant to Section 13(a)(1) of the Act, the Administrator promulgated the following regulations defining and delimiting the terms "any employee employed in a bona fide executive, administrative, professional * * * capacity * * *"

Executive

The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(A) whose primary duty consists of the management of the establishment in which he is employed or of a customarily recognized department or subdivision thereof, and

(B) who customarily and regularly directs the work of other employees therein, and

(C) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight, and

(D) who customarily and regularly exercises discretionary powers, and

(E) who is compensated for his services on a salary basis at not less than $30 per week (exclusive of board, lodging, or other facilities), and

(F) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the number of hours worked in the workweek by the nonexempt employees under his direction; provided that this subsection (F) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment.

Administrative

The term "employee employed in a bona fide * * * administrative * * * capacity" in section 13(a)(1) of the act shall mean any employe:

(A) who is compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) Whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

Professional

The term "employee employed in a bona fide * * * professional * * * capacity" in section 13(a)(1) of the act shall mean any employee who is:

(A) engaged in work:

(1) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, and

(2) requiring the consistent exercise of discretion and judgment in its performance, and

(3) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, and

(4) whose hours of work of the same nature as that performed by nonexempt employees do not exceed 20 percent of the hours worked in the workweek by the nonexempt employees; provided that where such nonprofessional work is an essential part of and necessarily incident to work of a professional nature, such essential and incidental work shall not be counted as nonexempt work; and

(5) (a) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes; or

(b) predominantly original and creative in character in a recognized field of artistic endeavor as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee, and

(B) compensated for his services on a salary or fee basis at a rate of not less than $200 per month (exclusive of board, lodging, or other facilities); provided that this subsection (B) shall not apply in the case of an employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and who is actually engaged in the practice thereof.

[PUBLIC—No. 718—75TH CONGRESS]
[CHAPTER 676—3D SESSION]
[S. 2475]

AN ACT

To provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fair Labor Standards Act of 1938".

FINDING AND DECLARATION OF POLICY

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

DEFINITIONS

SEC. 3. As used in this Act—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying.

the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Chief of the Children's Bureau in the Department of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Chief of the Children's Bureau certifying that such person is above the oppressive child-labor age. The Chief of the Children's Bureau shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Chief of the Children's Bureau determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodg-

ing, or other facilities are customarily furnished by such employer to his employees.

ADMINISTRATOR

SEC. 4. (a) There is hereby created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator"). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of $10,000 a year.

(b) The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary to carry out his functions and duties under this Act and shall fix their compensation in accordance with the Classification Act of 1923, as amended. The Administrator may establish and utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any litigation, but all such litigation shall be subject to the direction and control of the Attorney General. In the appointment, selection, classification, and promotion of officers and employees of the Administrator, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

(c) The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place.

(d) The Administrator shall submit annually in January a report to the Congress covering his activities for the preceding year and including such information, data, and recommendations for further legislation in connection with the matters covered by this Act as he may find advisable.

INDUSTRY COMMITTEES

SEC. 5. (a) The Administrator shall as soon as practicable appoint an industry committee for each industry engaged in commerce or in the production of goods for commerce.

(b) An industry committee shall be appointed by the Administrator without regard to any other provisions of law regarding the appointment and compensation of employees of the United States. It shall include a number of disinterested persons representing the public, one of whom the Administrator shall designate as chairman, a like number of persons representing employees in the industry, and a like number representing employers in the industry. In the appointment of the persons representing each group, the Administrator shall give due regard to the geographical regions in which the industry is carried on.

(c) Two-thirds of the members of an industry committee shall constitute a quorum, and the decision of the committee shall require a vote of not less than a majority of all its members. Members of an industry committee shall receive as compensation for their services a reasonable per diem, which the Administrator shall by rules and regulations prescribe, for each day actually spent in the work of the committee,

and shall in addition be reimbursed for their necessary traveling and other expenses. The Administrator shall furnish the committee with adequate legal, stenographic, clerical, and other assistance, and shall by rules and regulations prescribe the procedure to be followed by the committee.

(d) The Administrator shall submit to an industry committee from time to time such data as he may have available on the matters referred to it, and shall cause to be brought before it in connection with such matters any witnesses whom he deems material. An industry committee may summon other witnesses or call upon the Administrator to furnish additional information to aid it in its deliberations.

(e) No industry committee appointed under subsection (a) of this section shall have any power to recommend the minimum rate or rates of wages to be paid under section 6 to any employees in Puerto Rico or in the Virgin Islands. Notwithstanding any other provision of this Act, the Administrator may appoint a special industry committee to recommend the minimum rate or rates of wages to be paid under section 6 to all employees in Puerto Rico or the Virgin Islands, or in Puerto Rico and the Virgin Islands, engaged in commerce or in the production of goods for commerce, or the Administrator may appoint separate industry committees to recommend the minimum rate or rates of wages to be paid under section 6 to employees therein engaged in commerce or in the production of goods for commerce in particular industries. An industry committee appointed under this subsection shall be composed of residents of such island or islands where the employees with respect to whom such committee was appointed are employed and residents of the United States outside of Puerto Rico and the Virgin Islands. In determining the minimum rate or rates of wages to be paid, and in determining classifications, such industry committees and the Administrator shall be subject to the provisions of section 8 and no such committee shall recommend, nor shall the Administrator approve, a minimum wage rate which will give any industry in Puerto Rico or in the Virgin Islands a competitive advantage over any industry in the United States outside of Puerto Rico and the Virgin Islands.

No wage orders issued by the Administrator pursuant to the recommendations of an industry committee made prior to the enactment of this joint resolution pursuant to section 8 of the Fair Labor Standards Act of 1938 shall after such enactment be applicable with respect to any employees engaged in commerce or in the production of goods for commerce in Puerto Rico or the Virgin Islands.[1]

MINIMUM WAGES

SEC. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8, whichever is lower, and

(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 8,

(5) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers.[1]

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

(c) The provisions of paragraphs (1), (2), and (3) of subsection (a) of this section shall be superseded in the case of any employee in Puerto Rico or the Virgin Islands engaged in commerce or in the production of goods for commerce only for so long as and insofar as such employee is covered by a wage order issued by the Administrator pursuant to the recommendations of a special industry committee appointed pursuant to section 5 (e).[1]

MAXIMUM HOURS

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

[1] Amendment provided by Act of June 26, 1940 (Public Res. No. 88, 76th Congress).

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks,

(2) on an annual basis in pursuance of an agreement with his employer, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of fifty-two consecutive weeks, or

(3) for a period or periods of not more than fourteen workweeks in the aggregate in any calendar year in an industry found by the Administrator to be of a seasonal nature,

and if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

(c) In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged.

(d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

WAGE ORDERS

SEC. 8. (a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from

time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry.

(c) The industry committee for any industry shall recommend such reasonable classifications within any industry as it determines to be necessary for the purpose of fixing for each classification within such industry the highest minimum wage rate (not in excess of 40 cents an hour) which (1) will not substantially curtail employment in such classification and (2) will not give a competitive advantage to any group in the industry, and shall recommend for each classification in the industry the highest minimum wage rate which the committee determines will not substantially curtail employment in such classification. In determining whether such classifications should be made in any industry, in making such classifications, and in determining the minimum wage rates for such classifications, no classification shall be made, and no minimum wage rate shall be fixed, solely on a regional basis, but the industry committee and the Administrator shall consider among other relevant factors the following:

(1) competitive conditions as affected by transportation, living, and production costs;

(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry.

No classification shall be made under this section on the basis of age or sex.

(d) The industry committee shall file with the Administrator a report containing its recommendations with respect to the matters referred to it. Upon the filing of such report, the Administrator, after due notice to interested persons, and giving them an opportunity to be heard, shall by order approve and carry into effect the recommendations contained in such report, if he finds that the recommendations are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the industry committee, will carry out the purposes of this section; otherwise he shall disapprove such

recommendations. If the Administrator disapproves such recommendations, he shall again refer the matter to such committee, or to another industry committee for such industry (which he may appoint for such purpose), for further consideration and recommendations.

(e) No order issued under this section with respect to any industry prior to the expiration of seven years from the effective date of section 6 shall remain in effect after such expiration, and no order shall be issued under this section with respect to any industry on or after such expiration, unless the industry committee by a preponderance of the evidence before it recommends, and the Administrator by a preponderance of the evidence adduced at the hearing finds, that the continued effectiveness or the issuance of the order, as the case may be, is necessary in order to prevent substantial curtailment of employment in the industry.

(f) Orders issued under this section shall define the industries and classifications therein to which they are to apply, and shall contain such terms and conditions as the Administrator finds necessary to carry out the purposes of such orders, to prevent the circumvention or evasion thereof, and to safeguard the minimum wage rates established therein. No such order shall take effect until after due notice is given of the issuance thereof by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give to interested persons general notice of such issuance.

(g) Due notice of any hearing provided for in this section shall be given by publication in the Federal Register and by such other means as the Administrator deems reasonably calculated to give general notice to interested persons.

ATTENDANCE OF WITNESSES

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

COURT REVIEW

SEC. 10. (a) Any person aggrieved by an order of the Administrator issued under section 8 may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Administrator be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon the Administrator, and thereupon the Administrator shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part, so far as it is applicable to the

petitioner. The review by the court shall be limited to questions of law, and findings of fact by the Administrator when supported by substantial evidence shall be conclusive. No objection to the order of the Administrator shall be considered by the court unless such objection shall have been urged before the Administrator or unless there were reasonable grounds for failure so to do. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence may materially affect the result of the proceeding and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings by reason of the additional evidence so taken, and shall file with the court such modified or new findings which if supported by substantial evidence shall be conclusive, and shall also file his recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(b) The commencement of proceedings under subsection (a) shall not, unless specifically ordered by the court, operate as a stay of the Administrator's order. The court shall not grant any stay of the order unless the person complaining of such order shall file in court an undertaking with a surety or sureties satisfactory to the court for the payment to the employees affected by the order, in the event such order is affirmed, of the amount by which the compensation such employees are entitled to receive under the order exceeds the compensation they actually receive while such stay is in effect.

INVESTIGATIONS, INSPECTIONS, AND RECORDS

SEC. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Administrator and the Chief of the Children's Bureau may, for the purpose of carrying out their respective functions and duties under this Act, utilize

the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

CHILD LABOR PROVISIONS

SEC. 12. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, no producer, manufacturer, or dealer shall ship or deliver for shipment in commerce any goods produced in an establishment situated in the United States in or about which within thirty days prior to the removal of such goods therefrom any oppressive child labor has been employed: *Provided*, That a prosecution and conviction of a defendant for the shipment or delivery for shipment of any goods under the conditions herein prohibited shall be a bar to any further prosecution against the same defendant for shipments or deliveries for shipment of any such goods before the beginning of said prosecution.

(b) The Chief of the Children's Bureau in the Department of Labor, or any of his authorized representatives, shall make all investigations and inspections under section 11 (a) with respect to the employment of minors, and, subject to the direction and control of the Attorney General, shall bring all actions under section 17 to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor, and shall administer all other provisions of this Act relating to oppressive child labor.

EXEMPTIONS

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds or other aquatic forms of animal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or

byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or (2) any employee of an employer subject to the provisions of Part I of the Interstate Commerce Act.

(c) The provisions of section 12 relating to child labor shall not apply with respect to any employee employed in agriculture while not legally required to attend school, or to any child employed as an actor in motion pictures or theatrical productions.

LEARNERS, APPRENTICES, AND HANDICAPPED WORKERS.

SEC. 14. The Administrator, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for (1) the employment of learners, of apprentices, and of messengers employed exclusively in delivering letters and messages, under special certificates issued pursuant to regulations of the Administrator, at such wages lower than the minimum wage applicable under section 6 and subject to such limitations as to time, number, proportion, and length of service as the Administrator shall prescribe, and (2) the employment of individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, under special certificates issued by the Administrator, at such wages lower than the minimum wage applicable under section 6 and for such period as shall be fixed in such certificates.

PROHIBITED ACTS

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any

[1] Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress, 53 Stat. 1266).

goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

(4) to violate any of the provisions of section 12;

(5) to violate any of the provisions of section 11 (c), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

(b) For the purposes of subsection (a) (1) proof that any employee was employed in any place of employment where goods shipped or sold in commerce were produced, within ninety days prior to the removal of the goods from such place of employment, shall be prima facie evidence that such employee was engaged in the production of such goods.

PENALTIES

SEC. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The count in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

INJUNCTION PROCEEDINGS

SEC. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15.

RELATION TO OTHER LAWS

SEC. 18. No provision of this Act or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this Act or a maximum workweek lower than the maximum workweek established under this Act, and no provision of this Act relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this Act. No provision of this Act shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this Act, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this Act.

SEPARABILITY OF PROVISIONS

SEC. 19. If any provision of this Act or the application of such provision to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

Approved, June 25, 1938.